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No. 07-280

FILED
OCT 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

KURT H. EICHORN, WILLIAM J. HUCKINS, T. ROGER KIANG, EDWARD W. LANDIS, ORLANDO NAPOLITANO, GILBERT G. DALEY, SUSAN H. DIBONA, BETH KING, MICHAEL S. ORATOWSKI, THOMAS L. SALISBURY, LAWRENCE WALSH, WILLIAM LAWLESS, RUSSELL LEPPALA, GABE P. TOROK, JUDITH B. BRUGNER, KATE HARRIS, CAROLE T. JOHNSON, CHARLES O. LAUGHLIN, II, MICHAEL A. MCFARLAND,

(*Caption continued on inside cover*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS AT&T CORPORATION, LUCENT TECHNOLOGIES INC. AND NCR CORPORATION'S BRIEF IN OPPOSITION

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Petitioners,

—v.—

AT&T CORPORATION, LUCENT TECHNOLOGIES INC., TEXAS PACIFIC GROUP, NCR CORPORATION, and THE CIT GROUP, INC.,

Respondents.

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether petitioners' claim to monetarily-enhanced pension payments amounts to anything other than a request for legal relief falling outside 29 U.S.C. 1132(a)(3)'s allowance for "appropriate equitable relief?"

2. Whether petitioners, who are already receiving all benefits to which they are entitled as a consequence of their actual periods of service, may obtain under 29 U.S.C. 1132(a)(1)(B) additional monetary awards beyond what they would be entitled to under the applicable written plan terms in light of their actual service?

PARTIES BELOW AND PARENT COMPANIES

In April 2006, Lucent Technologies Inc. ("Lucent") and Alcatel SA agreed to consolidate with each other in a merger of equals. The merger closed on November 30, 2006 whereby Lucent merged with one of the subsidiaries of Alcatel SA. Lucent, a Delaware corporation, is now a wholly-owned subsidiary of Alcatel U.S.A., Inc., a Delaware Corporation. Alcatel U.S.A. Inc. is a wholly-owned indirect subsidiary of Alcatel-Lucent, S.A., a corporation organized under the laws of the Republic of France. No publicly-held corporation owns 10% or more of Alcatel-Lucent.

AT&T Corporation is wholly-owned subsidiary of AT&T Inc. No publicly-held corporation owns 10% or more of AT&T Inc.

NCR Corporation is a publicly traded corporation organized and existing under the laws of the State of Maryland. NCR Corporation does not have a parent corporation and no publicly-held corporation owns 10% or more of NCR Corporation.

TABLE OF CONTENTS

PAGE

COUNTER STATEMENT OF THE QUESTION PRESENTED FOR REVIEW i

PARTIES BELOW AND PARENT COMPANIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

SUMMARY OF REASONS TO DENY THE PETITION 1

COUNTERSTATEMENT OF THE CASE .. 2

A. Factual Background 2

B. This Litigation and its Procedural History 5

REASONS FOR DENYING THE WRIT OF CERTIORARI 10

I. PETITIONERS' DISSATISFACTION WITH THE ESTABLISHED INTERPRETATION OF THE PLAIN LANGUAGE OF ERISA § 502(A)(3) DOES NOT CREATE AN ISSUE WORTHY OF A GRANT OF CERTIORARI 10

PAGE

A. This Court's Opinions in *Mertens* and *Great-West* have Already Interpreted Correctly the Language Congress Chose When Enacting the ERISA Enforcement Provisions and Thus Resolved Already Any Claimed Conflicts 10

B. The Third Circuit's Decision in *Eichorn* is Consistent with Those of Other Circuits and There is No Inter-Circuit Conflict..... 14

C. The Third Circuit's *Eichorn* Decision Does Not Conflict with *Varity* and *Bowen* and Like Authority..... 18

D. Dissatisfaction Expressed by Judicial or Academic Commentators with ERISA's Statutory Language Should Not be Mistaken for a Present Conflict Among the Circuits 23

PAGE

II. WHILE ERISA UNDOUBTEDLY RELATES GENERALLY TO ISSUES OF PUBLIC IMPORTANCE, THE PARTICULAR ISSUES ALLEGED IN THE PRESENT PETITION ARE ONES ONLY CONGRESS CAN ADDRESS ... 25

III. THIS CASE IS DEMONSTRABLY NOT THE PROPER VEHICLE TO ADDRESS INTERTWINING MONETARY DAMAGES AND EQUITABLE RELIEF UNDER § 502(A)(3), AND ESPECIALLY NOT UNDER § 502(A)(1)(B)..... 27

IV. THE INSTANT MATTER PRESENTS FUNDAMENTALLY DIFFERENT ISSUES THAN *LARUE V. DEWOLFF, OBERG & ASSOCIATES, INC.*, 127 S.CT. 2391 (2007) AND TANDEM CONSIDERATION IS NOT WARRANTED..... 32

CONCLUSION 34

TABLE OF AUTHORITIES

Cases: PAGE

Adams v. Cyprus Amax Minerals Co., 149 F.3d 1156 (10th Cir. 1998) 17

Administrative Comm. of the Wal-Mart Assoc. Health and Welfare Plan v. Willard, 393 F.3d 1119 (10th Cir. 2004) 15, 16

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) 24, 25, 26

Alexander v. Bosch Auto Sys., 2007 U.S.App. LEXIS 11694 (6th Cir. 2007) 14, 24

Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206 (1984) 19

Bowen v. Massachusetts, 487 U.S. 879 (1988) 14, 21

Callery v. United States Life Ins. Co., 392 F.3d 401 (10th Cir. 2044), *cert. denied*, 546 U.S. 812 (2005) ..22, 23, 25

Cox v. Keystone Carbon Co., 894 F.2d 647 (3d Cir. 1990) 30, 31

Crosby v. Bowater Inc. Ret. Plan, 382 F.3d 587 (6th Cir. 2004) 30

DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442 (3d Cir. 2003)..... 24

Dollar Sav. Bank v. United States, 86 U.S. 227 (1873) 15

PAGE

Downie v. Indep. Driver Ass'n Pension Plan, 934 F.2d 1168 (10th Cir. 1991).. 23

Duncan v. Walker, 533 U.S. 167 (2001).... 31

Eichorn v. AT&T, 248 F.3d 131 (3d Cir. 2001) 6

Eichorn v. AT&T, 484 F.3d 644, *reh'g en banc denied*, 489 F.3d 590 (3d Cir. 2007).....20, 21, 23, 28, 29, 31

Enniss v. Enniss, 198 Fed. Appx. 594 (9th Cir. 2006).....14, 20

Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) 21

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 19

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) .....*passim*

Guidry v. Sheet Metal Workers Nat'l Pension, 493 U.S. 365 (1990).....15, 24

Held v. Mfrs. Hanover Leasing Corp., 912 F.2d 1197 (10th Cir. 1990)..... 28

LaRue v. DeWolff, Oberg & Assoc., Inc., 450 F.3d 570, (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (2007)...27, 32

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 19

PAGE

Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 15, 25

Mathews v. Chevron Corp., 362 F.3d 1172 (9th Cir. 2004) 17

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) 11, 12, 13, 16

Mills v. Green, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895) 19

Millsap v. McDonnell Douglas Corp., 368 F.3d 1246 (10th Cir. 2004) 15, 16, 21, 24

Oil Workers v. Missouri, 361 U.S. 363, 80 S.Ct. 391, 4 L.Ed.2d 373 (1960) 19

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 25

Russell v. Northrop Grumman Corp., 921 F. Supp. 143 (E.D.N.Y. 1996) 28, 32

Sereboff v. Mid Atlantic Med. Servs., Inc., 126 S. Ct. 1869 (2006) 13, 33

Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) 19

Strom v. Goldman, Sachs & Co., 202 F.3d 138 (2nd Cir. 1999) 28

Tolle v. Carroll Touch, Inc., 977 F.2d 1129 (7th Cir. 1992) 28

PAGE

U.S. v. Kramer, 757 F. Supp. 397 (D.N.J. 1991) 31

Varity Corp. v. Howe, 516 U.S. 489 (1996) 20

Statutes:

29 U.S.C. § 1132(a)(1)(B) 1

29 U.S.C. § 1132(a)(3) 1

29 U.S.C. § 1140 5

ERISA, § 502(a)(1)(B) 1, 27, 28, 29, 30, 31

ERISA § 502(a)(2) 32, 33

ERISA § 502(a)(3) ..... *passim*

ERISA § 510 ..... 2, 5, 16, 27

Rule:

Sup. Ct. R. 15(2) 15

Other Authority:

2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) (2d ed. 1993) 21

SUMMARY OF REASONS TO DENY THE PETITION

This Court has already, during recent years, considered, decided and then reiterated its position on the issue petitioners seek to have reviewed, namely the parameters of "appropriate equitable relief" under § 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). When Congress created ERISA's expansive statutory scheme, it explicitly preempted duplicative state law claims so that ERISA's chosen remedies would be the only remedies permitted. In ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), Congress chose to limit the available remedy to "equitable relief." This Court has thrice spoken on what "equitable relief" under this section allows. Petitioners request that this Court reverse those decisions, not because Congress has changed the plain and intentionally chosen statutory language already examined and interpreted by this Court, but rather because petitioners are dissatisfied with the available remedy Congress provided. This request should be denied.

Alternatively, if petitioners are not successful in having this Court reverse its previous decisions, petitioners would then have this Court rule that petitioners may resort to section § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), which only provides for various relief "under the terms of a plan." Petitioners, however, fail to acknowledge that they are not seeking relief for a violation of the terms of the plan at issue and, even if they were, that the procedural history of this case bars such relief.

Petitioners' request to change the law to accommodate their facts cannot be permitted.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

AT&T Corp. is a provider of telecommunications services in the United States and abroad. In 1989, AT&T purchased Paradyne Corporation, which was subsequently re-named AT&T Paradyne Corporation ("Paradyne"). Paradyne manufactured network access products for use by AT&T, as well as other customers world-wide. Throughout the period that AT&T owned Paradyne, Paradyne's economic performance was below expectations.

In 1995, because Paradyne was not performing well economically and anticipated not to meet its targets for the year, Paradyne instituted a Force Management Plan that resulted in layoffs. As a result of Paradyne's poor performance, AT&T considered closing Paradyne's operations entirely and terminating all Paradyne employees.

Ultimately, however, AT&T elected to sell Paradyne as an operating business unit to an outside purchaser. AT&T anticipated that the sale of Paradyne would streamline its own operations, and also that Paradyne would benefit from an expanded customer base, in that it would be able to sell its products to competitors of AT&T without encountering conflicts. Accordingly, on or about October 18, 1995, AT&T publicly announced its intention to offer Paradyne for sale.

At the same time, Paradyne announced that its employees (other than those whose jobs had been identified as "at risk" due to the September downsizing) would be ineligible to apply for employment with AT&T or other affiliated entities during the sale process. This restriction, referred to throughout these proceedings as the "Preliminary Net," was designed to maintain Paradyne's workforce intact in order to maximize the attractiveness and value of the company during the sale process. The Third Circuit has previously expressly held that the Preliminary Net did not violate § 510 of ERISA, this Court declined to review that ruling and the Preliminary Net is not at issue in this lawsuit.

Shortly thereafter, AT&T announced that it intended to spin-off two subsidiaries—Lucent Technologies and NCR Corporation—as independent companies, an event known as "trivestiture." NCR Corporation was a provider of information technology solutions and hardware and is not involved in this lawsuit. Lucent's business involved the design and manufacture of networking systems, software for communications service providers, and consumer telecommunications products.

Because Paradyne's business was closely aligned with Lucent's, AT&T transferred Paradyne to Lucent as part of the trivestiture process. As customers of Paradyne's network access products, both AT&T and Lucent had an interest in Paradyne's continued viability after the sale.

In 1996, AT&T and Lucent began negotiating to sell Paradyne to Paradyne Partners, L.P., Paradyne Acquisition Corp., Rental Acquisition

Corp., Cap Acquisition Corp. and Lease Acquisition Corp. who collectively acquired Paradyne. The Texas Pacific Group ("TPG") is an investment firm that was affiliated with the entities that collectively acquired Paradyne. The entities that acquired Paradyne are collectively referred to as "TPG" for ease of reference.

During the course of the negotiations, TPG indicated that it wanted to preserve and maintain Paradyne's human resource skill base to ensure that after the sale, Paradyne could avoid significant disruptions to its operations and position itself for a successful future. Accordingly, as part of the sale, TPG demanded assurance that the Paradyne employees, whose knowledge and expertise were critical to the successful transition and continuation of Paradyne, would not be hired away by AT&T or its affiliates prior to or immediately following the sale.

In order to address this concern during negotiations, and to maximize the negotiated selling price, AT&T and Lucent agreed that, prior to the closing of the sale to TPG, neither it nor AT&T or their affiliates would hire, retain or solicit any individual who was employed by, or a consultant to, Paradyne since June 1, 1996, and whose annualized compensation was greater than $50,000 for 1996. This agreement has been referred to throughout these proceedings as the "Pre-Closing Net."

TPG also demanded an agreement that the sellers would not hire Paradyne employees for a period of 24-months after the close of the sale. AT&T and Lucent refused to accept the proposed 24-month restriction. However, the parties con-

tinued to negotiate and, ultimately, agreed to a reduced hiring restriction that precluded AT&T, Lucent or their affiliates from hiring Paradyne employees earning greater than $50,000 for a period of 245 days (eight months) after the sale, unless such employees were terminated by the new company. In arriving at this period, the negotiators took into consideration the amount of time that would be necessary for TPG to prove its capabilities to Paradyne employees, the period necessary to ensure continued quality service to Paradyne's existing customers, and the time needed to position Paradyne to acquire new customers.

On June 19, 1996, Lucent formally announced its agreement to sell all of the outstanding shares of Paradyne's capital stock to TPG. In connection with that sale, Lucent, and the acquiring parties negotiated and entered into two agreements: a Purchase Agreement, entered into as of June 18, 1996 which contained the Pre-Closing Net; and an Employee Matters Agreement, entered into as of July 31, 1996, which contained the Post-Closing Net. The sale of Paradyne closed on July 31, 1996.

B. This Litigation And Its Procedural History

The petitioners allege violations of ERISA § 510, 29 U.S.C. § 1140, which prohibits employers from discriminating against a participant in an ERISA-governed benefit plan for the purpose of interfering with his attainment of benefits. Petitioners claim that the Post-Closing Net interfered with their ability to obtain immediate

credit for their prior service if they later returned to employment with a company that participated in the Lucent pension plan, because immediate credit for past service was available only to individuals who returned to service within six months after a separation. If successful in proving liability, petitioners request defendants pay them money to bring their pensions current, and pay them money going forward, as if they were still employed by Lucent.

This litigation has a tortured history and has languished for years. Petitioners plea for a grant of certiorari fails to provide facts that are dispositive of several issues petitioners raise. As such, an outline of certain key procedural dates is necessary.

7/24/96: Plaintiffs' first file complaints seeking "damages" as a result of alleged interference with their ERISA-protected pension and severance benefits.

8/23/99: District Court grants defendants' motion for summary judgment filed after thirty-six months of discovery.

4/23/01: The Third Circuit affirms in part and reverses in part, and additional discovery ensues thereafter. (*Eichorn v. AT&T*, 248 F.3d 131 (3d Cir. 2001)).

12/4/02: The District Court extends discovery and orders that it will close on January 31, 2003. The order also states that no further discovery will be conducted except by motion and for good cause shown.

1/31/03: Discovery closes with no motion to extend the discovery period.

5/27/03: For the first time and seven years after the action was filed, plaintiffs provide "damages" disclosures required by Fed. R. Civ. P. 26 mandatory disclosure requirements. In support of their benefit calculations, plaintiffs proffer the testimony of Stephen J. Crowley, a chemist by training, an admitted non-expert as to benefits or damages calculations and plaintiffs' counsel's son.

6/24/03: Almost seven years after commencing the litigation, plaintiffs move to have the proposed class certified.

10/21/03: Plaintiffs' motion for class certification is denied.

After denying class certification, the District Court turned to damages issues. Petitioners' motion to have their damage calculations even considered in this case was granted after extensive oral argument where petitioners represented that they wanted to rely upon Stephen Crowley's calculations. Petitioners were warned that if they moved forward with the calculations, they would "live or die" with them. Even in the face of this warning, petitioners chose not to retain a qualified expert at that time.

After allowing petitioners' chosen damages witness, Mr. Crowley, to produce his calculations (based in part on information gathered from the Foundation for Infinite Survival, Inc. website), to be examined at deposition, and for related dis-

covery to occur, the District Court addressed defendants' motion to strike such evidence and testimony. After further extensive argument, the District Court entered a November 10, 2004 Order stating that Mr. Crowley's reports and calculations were barred from admission and Mr. Crowley was precluded from testifying as a witness at trial. The Order also denied petitioners leave to add expert witnesses or submit calculations, reports or testimony from such experts.[1] The Order also states, in pertinent part:

> ORDERED that the Court does not reach the issue of whether plaintiffs can quantify or establish any right to **"back pay" and/or equitable relief** increasing plaintiff's [sic] pension benefits and reserves such issue for resolution at or before trial; and it is further
>
> ORDERED that the parties are directed to confer with Magistrate Judge Hughes to schedule limited discovery of **remaining damages issues** and preparation of a final pretrial order; . . . (emphasis added).

Magistrate Judge Hughes allowed petitioners to serve written discovery requests by December 10, 2004 "concerning plaintiffs' claims for damages and other forms of relief **that have not been precluded by the Court's November 10, 2004 Order**." (emphasis added).

---

[1] This issue was appealed to and affirmed by the Third Circuit, but has not been raised in Petitioners' request for certiorari.

Pursuant to this order, petitioners issued a variety of discovery requests, most of which defendants refused to answer as outside the scope of the limited discovery permitted under the November 10, 2004 Order. Petitioners requested that the Magistrate Judge compel the defendants to produce the requested discovery, which the Magistrate Judge denied. His order stated that the discovery served by petitioners "far exceeds the parameters of Fed. R. Civ. P. 26(b)(1), given the limited discovery allowed" by the Court as indicated by colloquy at argument on November 1, 2004 and the Order filed November 10, 2004 and that the documents produced already were sufficient and that petitioners had had more than ample time to conduct discovery over the then nine-year life of this case. Petitioners appealed this May 16, 2005 order to the District Court.

On July 22, 2005, the District Court affirmed the May 16, 2005 Order. The District Court noted that it had "**wholly rejected plaintiffs' position that it was entitled to any future pension benefits**, and limited plaintiffs' remaining claims, if any, to back pay, provided that each individual plaintiff could actually prove entitlement to same with regard to any specific position allegedly denied." (emphasis added). The District Court further noted that, contrary to petitioners' argument, it did not intend to re-open discovery and that if it "had known [petitioners] would engage in such a misuse of the opportunity to conduct the limited discovery intended, it would not have granted leave for any."

Subsequently, TPG moved for summary judgment, joined by the other defendants. The District Court granted that motion and dismissed the case. Pet. App. D, 41a-70a. Petitioners appealed to the Third Circuit. In a reported decision, the Third Circuit affirmed the District Court's ruling. Pet. App. A, 1a-29a. Petitioners requested rehearing and rehearing *en banc*, both of which were denied. Judge Ambro filed a concurring opinion. App. B, 32a-40a. The Petition followed.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. PETITIONERS' DISSATISFACTION WITH THE ESTABLISHED INTERPRETATION OF THE PLAIN LANGUAGE OF ERISA § 502(a)(3) DOES NOT CREATE AN ISSUE WORTHY OF A GRANT OF CERTIORARI.

A. This Court's Opinions In *Mertens* and *Great-West* Have Already Interpreted Correctly The Language Congress Chose When Enacting The ERISA Enforcement Provisions And Thus Resolved Already Any Claimed Conflicts.

This Court has, already, correctly read and interpreted the plain statutory language of ERISA § 502(a)(3). In *Mertens*, this Court had occasion to examine § 502(a)(3), which states that a plan beneficiary, participant, or fiduciary may bring a civil action:

> (A) *to enjoin* any act or practice which violates any provision of [ERISA] or the terms of the plan or (B) *to obtain other appropriate equitable relief* (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan. . .

Mertens v. Hewitt Assoc., 508 U.S. 248, 253 (1993) (emphasis added). After examining the phrase "other appropriate relief," this Court found that it would only encompass those damages which were *typically* available in equity. *See id.* at 256. Such relief did not include compensatory or legal damages. *See id.*

In discussing Congress' choice of the words "equitable relief," it was noted that it is not acceptable to read a statute so as to render a modifier superfluous or to deprive it of all meaning when various sections of ERISA also utilize terms such as "remedial" relief and "legal" relief. *See id.* at 258-59. In so finding, this Court acknowledged the "tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs." *Id.* at 262-63.

In 2002, this Court underscored its ruling in *Mertens*. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the ERISA covered plan sought to enforce a reimbursement provision against its insured to recover monies she received from a third party related to an automobile accident. *See id.* at 207. The issue to be decided was whether such relief was permissible under § 502(a)(3) as equitable relief. *See id.* at 206.

Because ERISA is a "comprehensive and reticulated statute" and "the product of a decade of congressional study of the Nation's private employee benefits system," *id.* at 209, this Court was appropriately reluctant to tamper with the careful deliberation used in ERISA's creation of an enforcement scheme. Consequently, the Court refused to create remedies not explicitly authorized by the text. *See id.*

After examining the *Great-West* petitioners' unpersuasive arguments to the contrary, the Court found that the requested relief was not authorized by § 502(a)(3). *See id.* at 209-221. The relief was essentially a request for money damages, relief unavailable under this section of ERISA. *See id.* at 209-212. Moreover, even if the relief was characterized as "restitution," not all restitution was typically available in equity. *See id.* at 212-216. Equitable restitution refers to instances when a plaintiff is seeking to restore particular funds or property in the defendant's possession, not to impose personal liability on a party or to enforce some amorphous right to restitution *at law*. *See id.* at 214.

No matter how these petitioners attempt to contort their damage claims, the relief they request is clearly not equitable. If this Court were to employ petitioners' logic to its conclusion, all claims in all cases would be considered equitable in nature, an approach this Court has already specifically rejected because "'[e]quitable' relief must mean *something* less than *all* relief." *Great-West*, 534 U.S. at 209 (*citing Mertens*, 508 U.S. at 258, n. 8). Here, no matter how much petitioners "dance around the word,

what [they] seek is nothing other than compensatory damages." *Mertens*, 508 U.S. at 250.

This Court recently reaffirmed its *Mertens* and *Great-West* opinions. *See Sereboff v. Mid Atlantic Med. Servs., Inc.*, 126 S.Ct. 1869, 1873 (2006). After noting that "[t]his is not the first time we have had occasion to clarify the scope of the remedial power conferred on district courts by § 502(a)(3)(B)," this Court recounted and relied upon its previous relevant rulings. *See id.* After reminding the bar of the Congressional limitations of § 502(a)(3), this Court held that a suit by an insurer to recover funds pursuant to a reimbursement provision was permissible under § 502(a)(3) only when it requested specifically identifiable funds and was therefore equitable restitution. *See id.* at 1875-77.

Petitioners have provided no compelling basis to support their position that this Court's well-reasoned and logical statutory interpretation in *Mertens* and *Great-West*, just recently reaffirmed in *Sereboff*, should now be reversed. ERISA is "an enormously complex and detailed statute that resolve[s] innumerable disputes between powerful competing interests - not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. Petitioners displeasure with the remedies Congress chose is no reason for the Court to resort to legislating.

B. The Third Circuit's Decision In *Eichorn* Is Consistent With Those Of Other Circuits And There Is No Inter-Circuit Conflict.

Petitioners cite only a handful of cases to support their contention that a significant inter-circuit conflict exists.[2] When each of these few cases is reviewed and analyzed, however, it becomes evident that the conflict is a product of petitioners' imagination rather than a legal reality.

First, petitioners concede, as they must, that a recently-decided Sixth Circuit unreported case is in harmony with this Court's *Mertens/Great-West* decisions. *Alexander v. Bosch Auto Sys.*, 2007 U.S. App. LEXIS 11694 (6th Cir. 2007). In *Alexander*, plaintiff accused defendant plant of intentionally timing the plant closure so as to exclude plaintiffs from the offered plant closure benefits. *See id.* at *3-7. Plaintiffs sued alleging, *inter alia*, unlawful interference with benefits pursuant to § 510. *See id.* at *7. As a remedy, plaintiffs demanded the plant closure benefits to be reinstated. *See id.* at *7-8.

At oral argument, the *Alexander* defendants conceded liability but argued that the remedy sought, reinstatement in the plant's closure benefit plan, did not qualify as "other appropriate relief" under § 502(a)(3). After analyzing the issue under *Great-West*, the Sixth Circuit found that the requested remedy was not equitable and

[2] Petitioners also claim *Enniss v. Enniss*, 198 Fed. Appx. 594 (9th Cir. 2006), and *Bowen v. Massachusetts*, 487 U.S. 879 (1988), present conflicts. These cases do not do so and are addressed in Section IC below.

therefore not available. *See id.* at *25-30. In following *Great-West*, the Court of Appeals noted that to allow plaintiff's requested relief would be a "contortion of remedies law to characterize [it] as equitable restitution." *Id.* at *29. While the Court of Appeals stated it was "not calloused" to the plaintiffs situation, it recognized that plaintiffs might have had other remedies which they failed to pursue. *See id.* at 32. Moreover, the court noted that Congress provided the limited remedies and "did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at *32-33 (*citing Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985); *see Dollar Sav. Bank v. United States*, 86 U.S. 227, 233, 22 L. Ed. 80 (1873)). As such, "if there is to be any exception to or expansion of these remedies, it must come from Congress, not from this bench." *Id.* (*citing Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1260 (10th Cir. 2004) (quoting *Guidry v. Sheet Metal Workers Nat'l Pension*, 493 U.S. 365, 376, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990)).

Petitioners' characterization of *Administrative Comm. of the Wal-Mart Assoc. Health and Welfare Plan v. Willard*, 393 F.3d 1119 (10th Cir 2004), as conflicting with this Court's precedent is inaccurate.[3] *Willard* involved a suit seeking to

[3] The discussions of petitioners' improper characterizations of case law, as well as misrepresentations or omissions of relevant facts related to the underlying litigation are presented to the Court pursuant to Sup. Ct. R. 15(2) requiring opposition to address any perceived misstatement of fact or law. Given space constraints, however, Respondents are unable to address each and every misstatement.

enforce a reimbursement provision in plaintiff's benefit plan, similar to the *Great-West* case. *See id.* at 1120-21. The *Willard* court recounted the *Great-West* holding and applying this Court's definition of equitable restitution, found that in applying *Great-West* there will be some "direct or indirect transfer of money and we cannot read the statute to proscribe all forms of relief." *Id.* at 1125. This is the language petitioners cite in support of their claim that *Willard* conflicts with *Great-West*. In *Willard*, however, the Tenth Circuit found that the requested relief met the *Great-West* inspired three-part test that controls whether the requested restitution was equitable in nature. *See id.* 1121-1125. Since that test was satisfied, the Tenth Circuit pronounced that *Willard* involved "exactly the type of equitable restitution claim the Court had in mind in *Great-West*." *Id.* at 1125.

In their attempt to present a conflict, petitioners' claim that *Eichorn* would have been decided differently if one applied the Tenth Circuit's decision in *Millsap*. Such a contention is wrong. In *Millsap*, plaintiffs settled their claims for lost pension and health care benefits. *Millsap*, 368 F.3d at 1246. The only issue left in the case was whether back pay qualified as equitable relief under § 502(a)(3). *See id.* at 1249. After reviewing *Mertens* and *Great-West*, the court "easily" concluded that the back pay was compensatory in nature and therefore prohibited. *See id.* at 1254. Petitioners cited language, that § 510's "purpose is to protect the participants *in employee benefit plans*," *id.* at 1259 (emphasis in original), is taken wholly out of context. That

quote refers to the difference between ERISA and the National Labor Relations Act and Title VII, the latter two being make-whole statutes and ERISA protecting participants in employee benefit plans. *See id.* (discussing the distinction between Title VII back pay and § 502(a)(3) remedies).

Petitioners again misstate the holding in their discussion of *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004). The *Mathews* court found that an injunction "instating" plaintiffs into a severance package was equitable relief. *See id.* at 1186. In that case, the court stated that an injunction to modify the plan records was not on its face an award of monetary damages. *See id.* Moreover, the court found that the relief granted was also equitable in substance because all parties agreed that but for the termination, the plaintiffs would have been eligible for the benefits. *See id.*[4]

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[4] Perhaps realizing that the evidence to support a conflict is slight, petitioners resort to a few cases decided before *Great-West*, but that allegedly "conflict in principle" with this Court's holding. Pet. at 20. For instance, petitioners claim that *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156 (10th Cir. 1998), demonstrates a way to compensate the petitioners without running afoul of *Great-West*. But petitioners citations to dicta stating that money damages can be equitable relief do not demonstrate that it would conflict with *Great-West*. In fact, *Great-West* acknowledges that money can be provided by equitable relief. *Great-West*, 534 U.S. at 214 (explaining that equitable restitution referred to instances when a plaintiff was seeking to restore particular funds or property in the defendants possession, not to impose personal liability on a party).

As the cases cited by petitioner do not represent a inter-circuit conflict, certiorari would not be warranted.

C. The Third Circuit's *Eichorn* Decision Does Not Conflict With *Varity* and *Bowen* And Like Authority.

Petitioners present this Court with a red herring in their argument that even if awarding enhanced past pension benefits is determined to be a legal remedy, awarding enhanced future pension benefits would be an equitable one. First, petitioners request that this Court allow them to pursue future pension benefits. Even if this Court so held, this would still not provide petitioners a remedy as they have been precluded from seeking such relief by the lower court and have not appealed that ruling. Second, this argument ignores *Great-West's* pronouncement that § 502(a)(3) only permits those damages which were *typically* available in equity. *See id.* at 256. Petitioners provide no authority to support their claim that future payments are such a remedy.

The procedural posture of this case is dispositive of this issue. Petitioners have no damage expert and were denied leave to seek a replacement expert. As such, the District Court Judge found that petitioners were only able to pursue back pay and/or equitable remedies. The Third Circuit affirmed these rulings and they are not part of this petition. Petitioners' request that this Court address the question of whether the award of future pension benefits is equitable or legal runs afoul of Article III's standing requirements.

This Court has held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 168-169 (2000) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)). Therefore, to even be permitted to present an issue:

> a complaining party must show 'an injury to himself that is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). A ruling that does not provide any relief to the prevailing party ignores the duty of federal courts " 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' " *Oil Workers v. Missouri*, 361 U.S. 363, 367, 80 S.Ct. 391, 394, 4 L.Ed.2d 373 (1960), *quoting Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 133, 40 L.Ed. 293 (1895).

Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206, 1209 (1984). A successful ruling on the availability of future pension benefits would provide no redress to these petitioners, as they have already been precluded from seeking such relief below for rea-

sons that will remain unchanged whether by the result here or an opinion on this an abstract legal question.

Were this Court to address the issue despite petitioners' inability to achieve redress, *Varity*, *Bowen* and the like do not support plaintiff's argument.[5]

Any alleged reliance on *Varity* may be quickly dispelled. *Varity Corp. v. Howe*, 516 U.S. 489 (1996). First, the *Varity* Court did not rule on whether the relief sought was equitable because the parties stipulated that it was. *See Eichorn v. AT&T et al.*, 484 F.3d 644, 656, *reh'g en banc denied*, 489 F.3d 590 (3d Cir. 2007) (*citing Varity* and quoting that "Varity *concedes* that the plaintiffs satisfy most of this provision's requirements, namely, that the plaintiffs are plan 'participants' or 'beneficiaries,' *and that they are suing for 'equitable' relief to 'redress' a violation of § 404(a),* which is a 'provision of this title.'" (emphasis in *Eichorn*); *see also Great-West*, 534 U.S. at 221 n. 5 (stating it was undisputed in *Varity* that the relief sought was equitable).

Second, the *Varity* plaintiffs sought to be reinstated in the pension plan and receive pension credit for work they actually had done for the company. The plaintiffs in *Varity* "were deceived into transferring from one subsidiary to another

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[5] No extended discussion of *Enniss v. Enniss*, 198 Fed. Appx. 594 (9th Cir. 2006), an unpublished case mentioned by petitioners is warranted. The single page *Enniss* decision alludes in one paragraph to the equitable nature of the injunction provided in that case without explanation of the facts that led to that injunction or the required relief. *See id.* at *1. As such, it adds little to this discussion.

within the same company, and thus the relief in that case was measurable according to the defendants' gain, rather than the plaintiffs' loss." *Eichorn*, 484 F.3d at 656 (citations omitted). The petitioners here seek benefits for work they did not do. As such, the *Eichorn* court noted that:

> The remedy they seek is thus akin to "back pay," which is not an equitable remedy within the meaning of the statute. *Great-West*, 534 U.S. at 218 n.4, 122 S. Ct. 708; *see also Millsap*, 368 F.3d at 1253 ("[P]aying backpay damages is like paying an extra worker who never came to work." (*quoting Ford Motor Co. v. EEOC*, 458 U.S. 219, 229, 102 S. Ct. 3057, 73 L.Ed.2d 721 (1982)); *id.* at 1254 ("Plaintiffs' proposed method of calculating their backpay award is based on each individual class member's loss rather than Defendant's gain . . . [and] is thus in the nature of compensatory damages."); 2 Dan B. Dobbs, *Law of Remedies* § 6.10(5) at 226 (2d ed. 1993) ("Back pay claims do not differ remedially from the personal injury claim for lost wages, or the contract claim for past wages due, for example . . . [s]o, while reinstatement is clearly equitable as a form of injunctive relief, back pay seems to be just as clearly legal.") (footnotes omitted).

Bowen v. Massachusetts, 487 U.S. 879 (1988), is similarly inapposite. In *Bowen*, this Court

addressed the federal courts' jurisdiction to review a final Health and Human Service ("HHS") order refusing to reimburse a state for a category of expenditures under its Medicaid program. The statute disallowed review in cases seeking "money damages." *See id.* at 891-901. Aside from the vast factual differences that make *Bowen* readily distinguishable, the prospective relief sought there was equitable because the State was not seeking compensatory damages, rather it was seeking to enforce a statute requiring that HHS "shall pay" certain sums of money. *See id.* at 900-01. The underlying case, one to enforce the statute itself, involved the payment of money only in the most minimal sense, i.e., the equitable recovery of specific monies owed to the party. *See id.* at 893. The state was not seeking compensation for its losses, rather it was seeking to remedy the wrongful withholding of those funds. *See id.* at 901.[6] This is fundamentally different than asking a court to find that respondents interfered with petitioners' benefits rights and to order respondents to pay money to compensate petitioners for that loss.

This Court's decision in *Callery v. United States Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2044), *cert. denied*, 546 U.S. 812 (2005), is also plainly not in conflict with *Eichorn*. In *Callery*, the Tenth Circuit denied plaintiff's request to collect benefits from her ex-husband's life insur-

[6] Petitioners' reliance on Justice Scalia's dissent is similarly unavailing. Justice Scalia noted that he agreed with the majority that the actions were not barred "insofar as they seek injunctive or declaratory relief with prospective effect." *Id.* at 921-22 (emphasis added).

ance policy as such relief would constitute legal damages not available under ERISA § 502(a)(3). *See id.* at 402. The *Callery* court discussed and followed the dictates of *Mertens* and *Great-West*. *See id.* at 405. Moreover, petitioners representation that the *Callery* court "held" that court ordered changes to affect future payments was clearly equitable is misleading. *See* Pet. at 22. Rather, in dismissing the plaintiff's reliance on *Downie v. Indep. Driver Ass'n Pension Plan*, 934 F.2d 1168 (10th Cir. 1991), the *Callery* court noted that the *Downie* court used its "equitable powers to restore the parties to their original positions in order to affect the beneficiary ability to receive future payments." *Id.* at 407. That order, requiring the plaintiff to pay restitution so that the could receive restoration of his benefits, was what the *Callery* court discussed as qualifying as equitable relief. *See id.* at 407. As such, *Callery* did not "hold" that an ability to receive future payments was clearly equitable.

D. Dissatisfaction Expressed By Judicial Or Academic Commentators With ERISA's Statutory Language Should Not Be Mistaken For A Present Conflict Among The Circuits.

Judge Ambro's concurrence in *Eichorn II* underscores that the Third Circuit properly interpreted the relevant authority, namely *Great-West*, *Mertens*, and *Varity*. *Eichorn*, 489 F.3d 590, 591 (3d Cir. 2007) ("*Eichorn II*"). Judge Ambro acknowledges that "under this rubric, Eichorn's request for an adjustment of pension records that would create a payment obligation is clearly

unavailable." *Id.* (emphasis added). He continues on, however, to detail his dissatisfaction with the remedy ERISA provides and urges Congress or this Court to revisit the issue. *See id.* As is detailed in section II, if any revision to the statute is desired, it must come from Congress. The other authority cited by petitioners actually support this proposition. *See Millsap*, 368 F.3d at 1261 (stating that while not unsympathetic, there were other means to seek the legal recovery requested and if exception to § 502(a)(3)'s plan terms were to be permitted, "it is for Congress to undertake that task" (*citing Guidry*, 493 U.S. at 376; *Alexander*, 2007 U.S. App. LEXIS 11694, 19-20 (stating that while not calloused to plaintiff's situation, other remedies existed and change, if any, of ERISA's provisions must come from Congress (citing *Millsap*)); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004) (J. Ginsberg, concurring) (reiterating her dissatisfaction with *Mertens*, *Great-West*, and its ilk and discussing her ongoing dissatisfaction with those holdings and the ERISA remedial scheme); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453-467 (3d Cir. 2003) (Becker, C.J., concurring) (setting forth his displeasure with the ERISA preemption requirements and its remedial scheme) (Ambro, J., concurring) (same).

It is indisputable that consensus rarely, if ever, will be attained over a particular statute or remedy. Petitioners present nothing more than that disagreement, which is insufficient to overturn this Court's previous decisions. Petitioners' efforts to spin judicial discord from judicial dis-

satisfaction fail and the petition for certiorari should be denied.

II. WHILE ERISA UNDOUBTEDLY RELATES GENERALLY TO ISSUES OF PUBLIC IMPORTANCE, THE PARTICULAR ISSUES ALLEGED IN THE PRESENT PETITION ARE ONES ONLY CONGRESS CAN ADDRESS.

This Court has noted that ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefits system." *Mertens*, 508 U.S. at 251. Section 502(a)(3) is but one of the "six carefully integrated civil enforcement provisions" of ERISA. *Id.* at 252. Given this comprehensive framework, this Court has "been especially 'reluctant to tamper with [the] enforcement scheme' embodied in the statute by extending remedies not specifically authorized by its text." *Great-West*, 534 U.S. at 209 (citing *Russell*, 473 U.S. at 147 (1985)); *see also Callery*, 392 F.3d at 407 (noting that the "limitation of remedy is a product of the statute and we must enforce it.").

Further, Congress' "detailed provisions of § 502(a). . . represents a careful balancing of the need for promote and fair claim settlement procedures against the public interest in encouraging the formulation of employee benefits." *Davila*, 542 U.S. at 208 (addressing the preemptive reach of ERISA) (*citing Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)). While Justice Ginsberg concurred in *Davila* and utilized the opportunity to reiterate her dissatisfaction with *Mertens*, *Great-West*, and related cases, that con-

currence simply registered an ongoing disagreement with those holdings.

Moreover, while ERISA was undoubtedly enacted with underlying public interests in mind, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Great-West*, 534 U.S. at 220. As the same ERISA section also provides for relief without reference to either legal or equitable, this Court did "not attempt to adjust the 'carefully crafted and detailed enforcement scheme' embodied in the text that Congress has adopted." *Id.* at 221. As the Fourth Circuit aptly observed:

> Though Congress may one day take the remedial step plaintiff desires, it has not yet done so. It is not difficult to imagine why. In crafting ERISA, Congress sought a careful balance between the goals of "ensuring fair and prompt enforcement of rights under a plan" on the one hand and "encourag [ing] . . . the creation of such plans" on the other. *Davila*, 542 U.S. at 215, 124 S.Ct. 2488. (internal quotation marks omitted). It would certainly be reasonable for Congress to have concluded that imposing personal financial liability on fiduciaries under circumstances such as this—where there was no unjust enrichment, unlawful possession, or self-dealing—would seriously deter plan formation and the service of qualified individuals and institutions

as fiduciaries. *Compare, e.g., Mertens*, 508 U.S. at 262-63, 113 S.Ct. 2063 (discussing negative effects of expansive ERISA liability).

LaRue v. DeWolff, Oberg & Assoc., Inc., 450 F.3d 570, 577-78 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (2007).[7] The change petitioners advocate, if ERISA were to change at all, must come from Congress.

III. THIS CASE IS DEMONSTRABLY NOT THE PROPER VEHICLE TO ADDRESS INTERTWINING MONETARY DAMAGES AND EQUITABLE RELIEF UNDER § 502(A)(3), AND ESPECIALLY NOT UNDER § 502(A)(1)(B).

Petitioners state that one question presented to this Court is whether § 502(a)(1)(B) provides a remedy if § 502(a)(3) precludes a remedy because of the "element of monetary damages." Therefore, petitioners claim that this case provides an appropriate vehicle to for this Court to address whether § 502(a)(1)(B) may be utilized in § 510 cases. Pet. at 12-13, n. 1 & 2. In crafting this argument, petitioners avoid addressing the central issue that has foreclosed them from seeking relief under this section.

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[7] Petitioners also request that the Court seek the Solicitor General's opinion in an effort to marshal other, similarly dissatisfied parties to provide a veneer of support for their position. But such opinions do nothing to assist the Court in deciding these issues. As discussed above, a change in the ERISA scheme can come from only one source, Congress, the only entity that has the ability to effectuate any change to this sweeping and comprehensive statutory design.

The *Eichorn* court found that the plain statutory language of Section 502(a)(1)(B) provides that "A civil action may be brought—(1) by a participant or beneficiary— . . . (B) to recover benefits due to him **under the terms of his plan**, to enforce his rights **under the terms of the plan**, or to clarify his rights to future benefits **under the terms of the plan**." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). There was no question that the *Eichorn* plaintiffs were alleging interference with the plan, not a breach of its terms and therefore ERISA § 502(a)(1)(B) did not provide a remedy. *See Eichorn*, 484 F.3d at 651-54; *see also Russell v. Northrop Grumman Corp.*, 921 F. Supp. 143 (E.D.N.Y. 1996) (finding a plaintiff could not seek relief under § 502(a)(1)(B) because he was alleging interference, not a failure to abide by the terms of the plan) (*citing Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992)); *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2nd Cir. 1999), *abrogated on other grounds by Great-West*, 534 U.S. at 214-15 (holding that plaintiff's claim for monies from an insurance policy for her ex-husband that required the insured be a spouse was not viable under § 502(a)(1)(B) as that section required a contractual right to benefits "due to him under the plan."); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1203 (10th Cir. 1990) (stating that where a plaintiff alleged both he was wrongfully terminated to stop his vesting and he was entitled to his benefits under the plan up until his termination, he stated both § 502(a)(3) and 502(a)(1)(B) claims).

The remedies available under ERISA § 502(a)(1)(B) are not at issue in this case because petitioners cannot proceed under this section as their claims plainly do not arise out of a violation of the plan itself. The issue of whether the section allows for equitable and/or legal relief is wholly irrelevant to this finding. The *Eichorn* court's description of petitioners' failed theory illuminates its problem, stating that:

> The plaintiffs' principal argument appears to be that, although they have not alleged that the defendants violated the terms of the benefits plan, the District Court could nevertheless effectively create a violation of the plan through a decree ordering Lucent to adjust its pension records to treat the plaintiffs as if they had remained at Lucent until retirement. The plaintiffs contend that such an order would result in an immediate obligation on the part of the defendants to pay the plaintiffs money that was rendered "past due" by operation of the court's decree, thus entitling the plaintiffs to seek relief under subsection (a)(1)(B). This bootstrap approach finds no support in the decisions the plaintiffs cite.

Eichorn, 484 F.3d at 653.

In an attempt to distract the Court from these petitioners' inability to utilize § 502(a)(1)(B), petitioners cite several cases that allegedly support their arguments. A review of this authority,

however, reveals that it accomplishes no such goal.

In *Crosby v. Bowater Inc. Ret. Plan*, 382 F.3d 587 (6th Cir. 2004), plaintiff sought to receive benefits above and beyond what the terms of the plan would have allowed under § 502(a)(3). *See id.* at 590. The court vacated the award from the lower court as impermissible because it was not appropriate equitable relief under § 502(a)(3). *See id.* at 592-93. Contrary to petitioners description, rather than imply a cause of action may have been viable under that section, the court noted that "[u]nder the language of the plan, Mr. Crosby was entitled to less than he had already been paid—a circumstance that explains the decision not to invoke § 502(a)(1)(B)." *Id.* at 591.

Petitioners misleading depiction of *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir. 1990) ("*Cox II*") necessitates a short discussion. Petitioners claim that *Cox* supports their assertion that they are entitled to relief under § 502(a)(1)(B) because the *Cox* court found that an action that fits within the second clause is "patently equitable in nature." Pet. at 14. First, *Cox II* and its predecessor examined the issue of whether an ERISA claim warranted a jury trial. *Eichorn*, 484 F.3d at 654. Moreover, while the above is a technically accurate quote, in that dicta the court was discussing the fact that a plan must incorporate an appeal process and a suit to enforce that right would fit into the sec-

ond clause and is "patently equitable in nature." *See id.* at 650.[8]

Moreover *Great-West* tacitly acknowledges that a claim not arising out of the contract must proceed using the catch-all § 502(a)(3). Using petitioners' logic, rather than established authority, any cause of action related to a pension plan would fall under both § 502(a)(1)(B) and § 502(a)(3), making the differences between those provisions meaningless. *Duncan v. Walker*, 533 U.S. 167, 174 (2001); *U.S. v. Kramer*, 757 F. Supp. 397, 419 (D.N.J. 1991). Petitioners resort to an ERISA section that, on its face, cannot provide them relief certainly does not merit a grant certiorari.

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[8] As for the claim that *Cox II* supports petitioners claim that even in the face of clear statutory language requiring a claim under the terms of the plan to utilize § 502(a)(1)(B), it should provide a remedy for interference claims, the *Eichorn* court noted that:

> We did not undertake any analysis of whether the district court had correctly held that a claim under § 510 could be enforced under § 502(a)(1)(B). The only comment we made that appears directly relevant to this issue undermines, rather than supports the plaintiffs' position in this case. In disposing of Cox's arguments, we stated, "[t]o the extent that Cox seeks compensatory damages for tortious interference, that claim does not fall within section 502(a)(1)(B)."

Eichorn, 484 F.3d at 654.

IV. THE INSTANT MATTER PRESENTS FUNDAMENTALLY DIFFERENT ISSUES THAN *LaRUE V. DEWOLFF, OBERG & ASSOCIATES, INC.*, 127 S.Ct. 2391 (2007) AND TANDEM CONSIDERATION IS NOT WARRANTED.

On June 18, 2007, this Court granted certiorari in *LaRue v. DeWolff, Oberg & Assoc., Inc.*, 450 F.3d 570 (4th Cir. 2006), *cert. granted*, 127 S.Ct. 2971 (2007). There, petitioner claims he lost value in his pension plan because the fiduciary failed to follow his investment instructions. Petitioner alleged that he lost approximately $150,000 from this alleged breach and sought to recover that amount. The thrust of petitioner's claim in *LaRue* is that he should be permitted to utilize § 502(a)(2) to recover personal losses when that section only authorizes actions that inure to the benefit of the plan. *See id.* at 573. (*citing Russell*, which states that "[r]ecovery under this subsection must 'inure[ ] to the benefit of the plan *as a whole*,;' not to particular persons with rights under the plan."). The *LaRue* petitioners further argued that if relief is unavailable under § 502(a)(2), then relief should be available under § 502(a)(3). The Fourth Circuit, following *Great-West*, found that since there were no specifically identifiably funds, the relief petitioner sought was not equitable restitution, rather it was for "make-whole" relief not permitted by that section. *See id.* at 576.

The *LaRue* result, to the extent at all relevant, is consistent with the Third Circuit's decision here, and thus provides no basis for contending any conflict between the Third and Fourth Cir-

cuits exists. Moreover, this Court's grant of certiorari in *LaRue* appears solely, or at least principally, driven by a desire to address the questions the *LaRue* petitioners raised as 29 U.S.C. § 1132(a)(2), a provision not at issue here in *Eichorn*. As the Court has addressed, as recently at 2006, the general issues arising in this case under 29 U.S.C. § 1132 (a)(3), *see Sereboff*, 126 S.Ct. 1869, it is clear that the much narrower, more specific "surcharge" question presented by *LaRue* under subsection (a)(3) provides no reason to take any action here other than to deny certiorari. *See LaRue's Questions Presented, No. 06-856.*

CONCLUSION

Respondents Lucent Technologies Inc. (now known as Alcatel-Lucent), AT&T Corporation and NCR Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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